

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

THOMAS WRAY HERNDON,

Petitioner,

v.

DWIGHT NEVEN, *et al.*,

Respondents.

Case No. 3:20-cv-00489-MMD-CLB

ORDER

Petitioner Thomas Herndon filed a *pro se* petition for writ of *habeas corpus* under 28 U.S.C. § 2254. (ECF No. 1-1 (“Petition”).) This habeas matter is before the Court for initial review under the rules governing § 2254 cases,¹ as well as consideration of Petitioner’s motion for appointment of counsel (ECF No. 4).

Pursuant to Habeas Rule 4, the assigned judge must examine the habeas petition and order a response unless it “plainly appears” that the petitioner is not entitled to relief. *Valdez v. Montgomery*, 918 F.3d 687, 693 (9th Cir. 2019). The rule allows courts to screen and dismiss petitions that are patently frivolous, vague, conclusory, palpably incredible, false, or plagued by procedural defects. *See Boyd v. Thompson*, 147 F.3d 1124, 1128 (9th Cir. 1998); *Hendricks v. Vasquez*, 908 F.2d 490, 491 (9th Cir. 1990) (collecting cases).

In this case, Petitioner challenges a conviction and sentence imposed by the Second Judicial District Court for Clark County (“state court”). *Nevada v. Herndon*, Case No. CR14-0284.² A jury found Petitioner guilty of sexual assault on a child under the age

¹All references to a “Habeas Rule” or the “Habeas Rules” in this order identify the rules governing § 2254 cases in the United States District Courts.

²The Court takes judicial notice of the online docket records of the Second Judicial District Court and Nevada appellate courts, which may be accessed by the public at: www.washoecourts.com/Query/DetailedCaseSearch and

1 of 14 and lewdness with a minor under the age of 14. On June 12, 2015, the state court
2 entered a judgment of conviction, sentencing Petitioner to 90 years to life with the
3 possibility of parole. The Nevada Supreme Court affirmed Petitioner's conviction in April
4 2017 and then denied Petitioner's request for rehearing on July 27, 2017.

5 On August 24, 2018, Petitioner filed a state petition for writ of *habeas corpus* ("state
6 petition") seeking post-conviction relief. The state petition was dismissed as untimely and
7 Petitioner did not show good cause for the delay. The Nevada Court of Appeals affirmed
8 the dismissal. A remittitur issued on August 18, 2020.

9 Petitioner represents that Petitioner mailed his federal habeas petition, or handed
10 it to a correctional officer for the purpose of mailing, on August 24, 2020. (ECF No. 1-1 at
11 15.) Petitioner raises four grounds for relief under the Fifth, Sixth, Eighth, and Fourteenth
12 Amendments, alleging Petitioner's constitutional rights were violated when: (1) a detective
13 continued questioning Petitioner after Petitioner invoked his right to counsel during
14 interrogation; (2) the state court prevented Petitioner's counsel from presenting a complete
15 defense; (3) the state court allowed a witness to invade the province of the jury; (4)
16 Petitioner's trial counsel provided ineffective assistance based on failures to (a) file a
17 motion to suppress Petitioner's videotaped police interview, (b) object to the government
18 introducing the same videotaped interview at trial, and (c) obtain the medical records of
19 Angel Pike. (ECF No. 1-1.) Having conducted an initial review, the Court will direct service
20 of the Petition.

21 Turning to Petitioner's motion for appointment of counsel (ECF No. 4) to assist
22 Petitioner in this habeas action, there is no constitutional right to appointed counsel in a
23 federal *habeas corpus* proceeding. See *Luna v. Kernan*, 784 F.3d 640, 642 (9th Cir. 2015)
24 (citing *Lawrence v. Florida*, 549 U.S. 327, 336-37 (2007)). However, an indigent petitioner
25 may request appointed counsel to pursue that relief. See 18 U.S.C. § 3006A(a)(2)(B). The
26 decision to appoint counsel is generally discretionary. *Id.* (authorizing appointment of
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28 <http://caseinfo.nvsupremecourt.us/public/caseSearch.do>.

1 counsel “when the interests of justice so require”). But counsel must be appointed if the
2 complexities of the case are such that denial of counsel would amount to a denial of due
3 process, and where the petitioner is so uneducated that he or she is incapable of fairly
4 presenting his or her claims. See *La Mere v. Risley*, 827 F.2d 622, 626 (9th Cir. 1987);
5 *Brown v. United States*, 623 F.2d 54, 61 (9th Cir. 1980).

6 The Court finds that appointment of counsel in this case is in the interests of justice.
7 Petitioner is serving a lengthy sentence of 90 years to life with the possibility of parole.
8 Petitioner’s motion for appointment of counsel represents that Petitioner has reading,
9 spelling, and math skills between a sixth to eighth grade level and borderline IQ scores.
10 Because Petitioner’s state petition was dismissed as untimely under Nevada law, it did not
11 toll the one-year statute of limitations for Petitioner’s federal habeas petition under the
12 Antiterrorism and Effective Death Penalty Act (AEDPA).³ As such, the federal petition
13 appears untimely absent another basis for tolling or delayed accrual. Given the complex
14 procedural obstacles Petitioner’s situation presents, the Court is persuaded that the
15 interests of justice require appointed counsel and Petitioner’s motion is thus granted.

16 It is therefore ordered that Petitioner Thomas Herndon’s motion for appointment of
17 counsel (ECF No. 4) is granted.

18 It is further ordered that the Federal Public Defender (FPD) is provisionally
19 appointed as counsel and will have 30 days to undertake direct representation of Petitioner
20 or to indicate the FPD’s inability to represent Petitioner in these proceedings. If the FPD
21 is unable to represent Petitioner, the Court will appoint alternate counsel. The counsel
22 appointed will represent Petitioner in all federal proceedings related to this matter,
23 including any appeals or *certiorari* proceedings, unless allowed to withdraw. A deadline
24 for the filing of an amended petition and/or seeking other relief will be set after counsel
25 has entered an appearance. The Court anticipates a deadline of approximately 120 days

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27 ³*Pace v. DiGuglielmo*, 544 U.S. 408, 412-16 (2005) (holding that a state petition
28 that violates the state statute of limitations is not “properly filed” for the purposes of 28
U.S.C. § 2244(d)(2)).

1 from entry of the formal order of appointment.

2 It is further ordered that any deadline established and/or any extension thereof will
3 not signify any implied finding of a basis for tolling during the time period established.
4 Petitioner at all times remains responsible for calculating the running of the federal
5 limitation period and timely presenting claims. That is, by setting a deadline to amend the
6 Petition and/or by granting any extension thereof, the Court makes no finding or
7 representation that the Petition, any amendments thereto, and/or any claims contained
8 therein are not subject to dismissal as untimely. See *Sossa v. Diaz*, 729 F.3d 1225, 1235
9 (9th Cir. 2013).

10 The Clerk of Court is directed to file Petitioner Thomas Herndon's petition for writ
11 of *habeas corpus* (ECF No. 1-1).

12 The Clerk of Court is further directed to add Nevada Attorney General Aaron D.
13 Ford as counsel for Respondents and electronically serve the Nevada Attorney General
14 with a copy of the Petition. Respondents' counsel must enter a notice of appearance within
15 21 days of entry of this order, but no further response will be required from Respondents
16 until further order of the Court.

17 The Clerk of Court is further directed to send a copy of this order to the *pro se*
18 Petitioner, the Nevada Attorney General, the Federal Public Defender, and the CJA
19 Coordinator for this division.

20 DATED THIS 26th Day of October 2020.

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23 MIRANDA M. DU
24 CHIEF UNITED STATES DISTRICT JUDGE
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